Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1980

No. 80-554

ROY M. COHN, G. DAVID SCHINE and
SAXE, BACON & BOLAN, P.C.
Petitioners,

—v.—

NATIONAL BROADCASTING CO., INC. and
UNIVERSAL CITY STUDIOS, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Questions Presented

1. Whether this Court has jurisdiction, pursuant to 28 U.S.C. § 1257(3), to review a judgment of the New York Court of Appeals, affirming the dismissal of a libel complaint for legal insufficiency, where the judgment did not necessarily determine any substantial federal question and where, in any event, the judgment rested on a ground of state law which was adequate to support the judgment and independent of any federal question

presented, to wit, that the allegedly offensive publication was not susceptible of a defamatory meaning.

2. Whether, if this Court has jurisdiction under 28 U.S.C. § 1257(3), it should exercise its discretion to review the decision below, pursuant to Rule 17 of this Court, when the New York Court of Appeals neither has decided a federal question in a way conflicting with the applicable decisions of this Court or the other state and federal courts, nor has decided an important question of federal law left unsettled by this Court.*

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* Pursuant to this Court's order of October 21, 1980, amending this Court's Rule 28.1 effective November 21, 1980, and at the request of the Clerk of this Court, respondents state as follows:

1. The owner and parent company of respondent National Broadcasting Co., Inc. ("NBC") is RCA Corporation. All subsidiaries and affiliates of respondent NBC are wholly owned.

2. The owner and parent company of respondent Universal City Studios, Inc. ("Universal") is MCA Inc. All domestic subsidiaries and affiliates of respondent Universal are wholly owned.

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Opinions Below

The opinion of the New York Court of Appeals is reported officially at 50 N.Y.2d 885 and also appears at 430 N.Y.S.2d 265 and 408 N.E.2d 672. The opinion of the Appellate Division, First Department, whose reasoning the Court of Appeals adopted in its opinion, appears officially at 67 A.D.2d 140 and also at 414 N.Y.S.2d 906.

Jurisdiction

Petitioners assert (Pet. 2-3) * that the jurisdiction of this Court rests on 28 U.S.C. §1257(3). Although nowhere clearly stated, petitioners apparently contend that the decision of the New York Court of Appeals necessarily determined a question involving a "title, right, privilege or immunity . . . specially set up or claimed under the Constitution, treaties or statutes of . . . the United States." 28 U.S.C. § 1257(3).

Constitutional Provisions Involved

Petitioners contend that the decision of the New York Court of Appeals involves an erroneous construction of the First Amendment to the Constitution, applied to state libel actions through the due process clause of the Fourteenth Amendment (Pet. 3). Respondents' ** submit that to the extent the decision of the New York Court of Appeals contained statements implicating the First Amendment, the statements were *dicta* or part of an alternative holding unnecessary to the judgment of the

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* References to pages of the petition are denoted herein by "Pet.," to pages of the petitioner's appendix by "Pet. App.," to pages of the appendix to the brief in opposition by "Resp. App.," and to pages of the brief in opposition by "Resp."

** George Eckstein, whom petitioners purport to name as a respondent herein, never was served with process and never entered an appearance in any proceeding below. Accordingly, he is not a party in this proceeding.

court. The principal holding was grounded solely on New York's common law of defamation. Accordingly, this case presents no constitutional or other federal issue for this Court's review.

Statement of the Case

On February 6, 1977 respondent NBC broadcast a three-hour film entitled "Tail Gunner Joe," which had been produced by respondent Universal. "Tail Gunner Joe," in the words of the Appellate Division, "portray[ed] the era of the late Senator Joseph McCarthy," and included brief appearances by actors playing the roles of respondents Cohn and Schine. *Cohn* v. *National Broadcasting Co.*, 67 A.D.2d 140, 143, 414 N.Y.S.2d 906, 907 (1st Dep't 1979), *aff'd mem.*, 50 N.Y.2d 885, 430 N.Y.S.2d 265, 408 N.E.2d 672 (1980).

Claiming they had been libeled by the film, petitioners thereafter sued respondents for damages. Petitioners' complaint * alleged, in essence, that "Tail Gunner Joe" depicted petitioners Cohn and Schine in defamatory fashion through (1) specific scenes and episodes in the film relating to those petitioners personally (Resp. App. 5a-10a, ¶¶ 21(a-d), 22(a-b)); (2) the general tenor of the film's appraisal of McCarthy's associates, including Cohn and Schine (Resp. App. 7a, 10a, ¶¶ 21(c), 22(c)); and (3) portrayals of McCarthy which Cohn and Schine assert defamed them derivatively (Resp. App. 10a-16a, ¶ 23). Petitioner Saxe, Bacon & Bolan, a law firm em-

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* For the sake of brevity, petitioners' amended complaint, the pleading dismissed below, is referred to herein as the "complaint." In addition to petitioners' libel claims, the complaint asserted claims for the alleged invasion of petitioners' New York statutory rights of privacy. The privacy claims were dismissed below and constitute no part of the petition to this Court.

A copy of petitioners' complaint is annexed as an appendix to this brief (Resp. App. 1a-30a). Paragraphs of the complaint are denoted by "¶."

ployer of Cohn that is never mentioned or depicted in "Tail Gunner Joe," sought damages for a claimed loss of public confidence in its practice which was allegedly attributable to the libel of Cohn (Resp. App. 16a-17a, ¶ 24).

On respondents' motion to dismiss, the trial court held that only one specific scene could be viewed as defaming Cohn and Schine (Pet. App. 41a-42a). The remainder of those petitioners' allegations, and all of the allegations of Saxe, Bacon & Bolan, were held not actionable under the New York common law of libel (Pet. App. 41a-46a). Concluding, on the parties' appeals, that not a single allegation of the complaint pleaded actionable libel under New York common law, the Appellate Division ordered the entire action dismissed. 67 A.D.2d at 146; 414 N.Y.S.2d at 909. Contrary to petitioners' misleading insistence (Pet. 12), the Appellate Division's decision was premised on its finding, as a matter of New York law, that no aspect of "Tail Gunner Joe" was "susceptible of libelous meaning." *Id.* at 144; 414 N.Y.S.2d at 908. The Appellate Division also said, in *dicta* or as part of an unnecessary, alternative holding, that even "were the film found to be defamatory, *which it was not*," *id.* at 145, 414 N.Y.S.2d at 909 (emphasis added), the libel claim was nonetheless required to be dismissed because Cohn and Schine, as "public figures," failed to allege with the specificity required by New York law "that the film was composed and thereafter exhibited with actual malice." *Id.* at 146; 414 N.Y.S.2d at 909.

In affirming the dismissal of petitioners' libel claim, the New York Court of Appeals adopted the reasoning of the Appellate Division and added that:

> "none of the individual passages of which plaintiffs complain are [sic] defamatory as to them. We would add only that in our view the cumulative effect of all of such passages cannot be said to be defamatory. While it is true that the courts 'will not strain' to interpret [allegedly defamatory works] 'in their mildest and most inoffensive sense

> to hold them non-libelous' (November v. Time, Inc., 13 NY2d 175, 178, quoting Mencher v. Chesley, 297 NY 94, 99), it is also true that courts will not strain to find a defamatory interpretation where none exists (see Tracy v. Newsday, Inc., 5 NY2d 134)."

Cohn v. *National Broadcasting Co.*, 50 N.Y.2d 885, 887, 430 N.Y.S.2d 265, 408 N.E.2d 672, 673 (1980). Given the Court of Appeals' holding that the allegedly offending film was not defamatory, petitioners' contention that they were denied "the opportunity to conduct pretrial discovery toward the issue of actual malice" (Pet. 12-13) is simply immaterial and utterly without constitutional significance.

Summary of Argument

The judgment below did not require a determination of any substantial federal question. The New York Court of Appeals addressed one question implicating constitutional concerns in an alternative holding unnecessary to the judgment. (Resp. 9-11).

Adequate grounds of state law support the judgment below and are wholly independent of any federal question the New York Court of Appeals may have decided. The only plausible issue of federal law arguably addressed by the New York Court of Appeals related to an affirmative defense and required no consideration in light of petitioners' failure to state a sufficient claim under New York common law (Resp. 11-12).

Even if this Court has jurisdiction to review a federal question decided below despite the existence of an adequate and independent state ground, Rule 17 of this Court suggests that the petition should be denied in the Court's discretion. Disposition of any federal question below does not conflict with prior decisions of this Court, or with the holdings of the other state and federal courts (Resp. 12-13).

Reasons For Denying The Writ

1. The Judgment of the New York Court of Appeals Did Not Require A Determination of Any Question of Federal Law

As a safeguard against inadvertent review of state law, to which this Court's jurisdiction does not extend, petitioners must demonstrate that the judgment below necessarily resolved a question of federal law. *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977); *Department of Mental Hygiene* v. *Kirchner*, 380 U.S. 194, 197 (1965); *Henry* v. *Mississippi*, 379 U.S. 443, 446-447 (1965), *cert. denied after remand*, 392 U.S. 931 (1968). A state court determination of a federal question is reviewable by this Court only where the question has been presented properly by the parties below and answered unavoidably by the state court, as "affirmatively appear[s]" from the record. *Durley* v. *Mayo*, 351 U.S. 277, 281 (1956), quoting *Williams* v. *Kaiser*, 323 U.S. 471, 477-78 (1945); *Lynch* v. *New York ex rel. Pierson*, 293 U.S. 52, 54 (1934). Petitioners here fail to identify a single, substantial federal question indispensably addressed by the New York Court of Appeals.

In a disingenuous treatment of the record, petitioners assert that the state court's dismissal of their libel complaint hinged on an adjudged failure adequately to plead actual malice. The holding, as portrayed by petitioners, resolved a federal question by diminishing the constitutional protection extended to "an individual's interest in his own reputation" (Pet. 21). On its face, however, the Court of Appeals' decision addressed no constitutional or other federal question. The one page memorandum opinion of the court relied solely on state law in affirming the dismissal of the complaint, holding that petitioners were not defamed by either the individual sequences of "Tail Gunner Joe" or by their cumulative effect. *Cohn* v. *Na-*

tional Broadcasting Co., 50 N.Y.2d 885, 887, 430 N.Y.S.2d 265, 408 N.E.2d 672, 673 (1980).*

Petitioners' assertion that a federal question was decided by the Court of Appeals rests on the assumption that that court, in adopting the reasoning of the Appellate Division necessarily affirmed the Appellate Division's statements regarding the insufficiency of petitioners' actual malice allegation. Even if that were so, however, the statements regarding actual malice, were at most *dicta* or an alternative basis for the Appellate Division's judgment. As such, the statements were unnecessary to the judgments of both courts, which were predicated sufficiently and in the first instance on the specific finding that, as a matter of New York State law, respondents' broadcast was not susceptible of a defamatory meaning.

While statements in *dicta* and alternative holdings may well implicate federal questions, such unnecessary determinations of federal law cannot sustain Supreme Court jurisdiction. *Richardson Machinery Co.* v. *Scott*, 276 U.S. 128, 133 (1928). This jurisdictional bar embodies the prudential principle that

> "[t]his Court . . . reviews judgments, not statements in opinions. [Citations omitted]. At times, the atmosphere in which an opinion is written may

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* Each of three previous Court of Appeals decisions cited in the memorandum opinion draws support only from precepts of New York's common law of libel. *November* v. *Time, Inc.*, 13 N.Y.2d 175, 244 N.Y.S.2d 309, 194 N.E.2d 126 (1963) (publication could be viewed as charging that plaintiff lawyer was a crook, under common law rule of "innuendo"); *Tracy* v. *Newsday, Inc.*, 5 N.Y.2d 134, 182 N.Y.S.2d 1, 155 N.E.2d 853 (1959) (libel plaintiff may not use "innuendo" to add a defamatory charge not fairly expressed by the publication); *Mencher* v. *Chesley*, 297 N.Y. 94, 75 N.E.2d 257 (1947) (New York common law of libel requires court not to evaluate published words in their most inoffensive sense). Not one of the cited opinions addressed any question of federal law.

become so surcharged that unnecessarily broad statements are made."

Black v. *Cutter Laboratories*, 351 U.S. 292, 297-98 (1956). Review of federal questions raised and considered only in *dicta* would yield impermissible advisory opinions. *See Zacchini* v. *Scripps-Howard Broadcasting Co., supra.*

2. The Decision of the New York Court of Appeals Rests on an Independent and Adequate Ground of State Law

Because the New York common law ground for decision alone adequately sustains the judgment, and operates independently of petitioners' asserted federal question, this Court lacks jurisdiction to undertake further review. *Zacchini* v. *Scripps-Howard Broadcasting Co., supra; Jankovich* v. *Indiana Toll Road Commission*, 379 U.S. 487, 489 (1965), quoting *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 210 (1935) and citing *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 281 (1961).

Although constitutionally enjoined from imposing liability without some demonstration of the publisher's fault, states remain entirely free to assess the defamatory quality of words and otherwise to shape their common law of libel. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 347 (1974); *see Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976). Here the New York Court of Appeals found simply that "Tail Gunner Joe" was not defamatory. This determination lies wholly within the province of the state court and serves as an adequate non-federal ground for dismissal of petitioners' complaint.

Even were this Court to review and reverse the alternative lower court holding regarding allegations of actual malice, as adopted by the Court of Appeals, state law would dictate the identical outcome of dismissal on remand.

In such circumstances, the grant of certiorari could only entail the rendition of a forbidden advisory opinion. *Zacchini* v. *Scripps-Howard Broadcasting Co., supra; Henry* v. *Mississippi, supra.*

3. Even if this Court Possesses Jurisdiction, Factors Governing the Discretionary Grant of Certiorari Render Review of This Case Inappropriate

Under this Court's Rule 17, a writ of certiorari ought not to be granted, even where jurisdiction exists, unless petitioners demonstrate "special and important reasons therefor." U.S. Sup. Ct. Rule 17.1, 28 U.S.C. (as amended, June 30, 1980). In contemplating review of a state court decision, this Court generally will act only to ameliorate conflict with its own opinions and with those of the other federal and state courts, and to evaluate state determinations of federal questions unanswered by this Court. U.S. Sup. Ct. Rule 17.1(b-c), 28 U.S.C. (as amended, June 30, 1980). Petitioners have failed to articulate any such call for the exercise of this Court's discretion.

The only federal issue plausibly considered by the courts below, irrespective of whether its resolution was necessary, concerns the pleading of a publisher's actual malice. Historically this Court grants certiorari to re-examine allegations of actual malice only where the state court sustains a libel claim over asserted constitutional defenses. *See New York Times Co.* v. *Sullivan*, 376 U.S. 254, 264 (1964); *accord, Ocala Star-Banner Co.* v. *Damron*, 401 U.S. 295 (1971); *Beckley Newspapers Corp.* v. *Hanks*, 389 U.S. 81 (1967). Precisely the opposite situation obtains here. The Court of Appeals' adopted alternative holding—that petitioners had insufficiently alleged actual malice—simply complements the protection afforded respondents by the finding that petitioners failed to state a libel claim under New York common law.

Petitioners' contention that they were erroneously denied discovery in contravention of *Herbert* v. *Lando*, 441 U.S. 153 (1979), similarly warrants no attention from this Court. Unlike petitioners in *Herbert*, petitioners here failed to state an actionable claim of libel and never sought any discovery. No divergence from *Herbert* even remotely appears. Petitioners can make no serious claim for the Court to exercise its discretion even in the event the Court were to find that jurisdiction otherwise exists.

Conclusion

For each of the reasons stated the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

Plaintiffs' Amended Complaint

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Index No. 07079/77

ROY M. COHN, G. DAVID SCHINE and SAXE, BACON & BOLAN, P.C.,

Plaintiffs,

—against—

NATIONAL BROADCASTING CO., INC., UNIVERSAL CITY STUDIOS, INC. and GEORGE ECKSTEIN,

Defendants.

The plaintiffs, Roy M. Cohn, G. David Schine and Saxe, Bacon & Bolan, P.C., by their attorneys, Lang & Nesci, P.C. complaining of the defendants, respectfully allege:

AND AS FOR A FIRST CAUSE OF ACTION

1. That at all times hereinafter mentioned, the plaintiff, Roy M. Cohn, did and still does maintain offices in the City, County and State of New York.

2. That at all times hereinafter mentioned, the plaintiff, G. David Schine, did and still does maintain offices in the City and County of Los Angeles, State of California.

3. That at all times hereinafter mentioned, the plaintiff, Saxe, Bacon & Bolan, P.C. (hereinafter referred to as "SB&B"), is a professional corporation duly organ-

ized and existing under and by virtue of the laws of the State of New York, does business on a continuous and regular basis in the City, County and State of New York, and has its principal place of business in the City, County and State of New York.

4. Upon information and belief, at all times hereinafter mentioned, the defendant, National Broadcasting Co., Inc. (hereinafter referred to as "NBC") does business on a continous and regular basis in the City, County and State of New York, and has its principal place of business in the City, County and State of New York.

5. Upon information and belief, at all times hereinafter mentioned, the defendant, Universal City Studios, Inc. (hereinafter referred to as "UCS") does business on a continuous and regular basis in the City, County and State of New York.

6. Upon information and belief the defendant, George Eckstein is a resident of the State of California and transacts business within the State of New York, is employed by defendant UCS and maintains an office in UCS's building in California.

7. Plaintiff, Roy Cohn, served as the Chief Counsel to the United States Senate Permanent Subcommittee on Investigations of the Committee on Government Operations during 1953 and 1954.

8. Plaintiff, G. David Schine, served as unsalaried Chief Consultant for the United States Senate Permanent Subcommittee on Investigations of the Committee on Government Operations during 1953 and 1954.

9. Plaintiff, Roy M. Cohn, is now and has been for many years successfully engaged in the practice of law.

10. Plaintiff, G. David Schine, is now and has been for many years a motion picture producer of the highest calibre, engaged in this and other businesses.

11. Plaintiff, SB&B is now and has been for many years a professional corporation successfully engaged in the practice of law.

12. On or about October 24, 1976 the plaintiffs became aware the NBC, UCS and Eckstein were then engaged and were continuing to engage in a conspiracy to maliciously and wilfully participate in a plan and course of action designed to defame and injure the plaintiffs in their good names and in their professions.

13. In pursuance of said conspiracy and plan, plaintiffs learned, the defendants planned and caused to be made a film entitled "Tail Gunner Joe." Said film was intended as a character assassination of the late Senator Joseph McCarthy and the principal figures involved with McCarthy especially during the so-called Army-McCarthy hearings, including the plaintiffs, Cohn and Schine.

14. On November 30, 1976 plaintiff, Roy M. Cohn, wrote to Herbert Schlosser, President of NBC, and sent a copy of that letter to UCS. Plaintiff Cohn therein explicitly withheld his consent to the use of any actors to represent him; and, in the interest of fairness and accuracy, asked that he be given an opportunity to view said movie with an eye towards contributing to the correction of any inaccuracies or misrepresentations. A copy of that letter is annexed hereto as Exhibit A.

15. Defendant NBC merely had a representative inform Cohn to contact UCS, even though he had already done so, which gives further evidence of NBC's intent to air this film in reckless disregard of the truth. Sheldon M. Mittleman, attorney for UCS, wrote Cohn on January 3, 1977. A copy of that letter is annexed hereto as Exhibit B. He indicated that "it would be an injustice to seek advice and opinions from only a select group". Defendant UCS obviously felt they had the "facts" they

wanted; and they did not intend to change their film to conform to facts which might be supplied by Cohn, who, as a participant in the events depicted, could have easily spotted inaccuracies and misrepresentations contained therein.

16. On January 24, 1977, plaintiff Cohn wrote to Mr. Mittleman expressing his dissatisfaction with UCS's response. A copy of that letter is annexed hereto as Exhibit C. On January 20, 1977 Cohn wrote Jay Gerber, Assistant Counsel to NBC, to express his disappointment with NBC's response. A copy of that letter is annexed hereto as Exhibit D.

17. Again Cohn was denied an opportunity to view said film in order to correct inaccuracies and misrepresentations. A copy of NBC's and UCS's replies are annexed hereto respectively as Exhibits E and F. This refusal to permit the plaintiff to see either the script or the film is a manifest demonstration of the defendants' prejudice and intent to maliciously distort the facts in reckless disregard of the truth.

18. On December 14, 1976, plaintiff Schine wrote to both UCS and NBC. Copies of those letters are annexed hereto respectively as Exhibits G and H. He explicitly withheld his consent to the use of any actors to represent him; and he requested that he be given an opportunity to see the script or the film of "Trail Gunner Joe" in order to comment on any inaccuracies. He made it clear that his concern was only that accuracy and fairness be observed. However, he was never granted such an opportunity. In fact, NBC merely suggested that he direct his comments to UCS. A copy of NBC's letter is annexed hereto as Exhibit G.

19. In pursuance of the aforementioned conspiracy and plan, defendant NBC, on or about February 6, 1977, caused to appear over its national television network a

three-hour program entitled "Tail Gunner Joe." Said film was made and supplied by defendant UCS, produced by defendant Eckstein and purported to deal with events occurring before and leading up to and including the so-called Army-McCarthy hearings of 1954. Actors were used to portray Cohn and Schine. The movie was shown to the general public in the City, County and State of New York on February 6, 1977, and, on information and belief, in every state of the nation, as well.

20. "Tail Gunner Joe" contains a twisting, slanting falsification and distortion of the actual events depicted therein, as well as significant omissions therefrom; and the movie contains new and independent falsehoods made maliciously and in reckless disregard of the truth. The overall effect of the publication of this movie is to cast the plaintiffs in a false light, to defame them, and to injure them in their reputations and professions.

21. As to plaintiff Cohn specifically, the portrayal was false, defamatory and damaging in that:

(a) preceding any significant appearance by Cohn, an alleged conversation between Robert F. Kennedy and Jean Kerr is depicted at an airport, in the course of which remarks disparaging to Cohn such as that he had no qualification to be counsel for the committee, are made, to wit:

> Robert Kennedy: For that matter, what's Roy doing here?
>
> Jean Kerr: We're going to New York—all of us. We're going to investigate the Voice of America, remember?
>
> Robert Kennedy: I remember.
>
> Jean Kerr: I don't understand why you don't like Roy, he's a very bright young man.

Robert Kennedy: He doesn't laugh much does he?

Jean Kerr: Is that so important?

Robert Kennedy: Maybe.

No such conversation took place in words or substance; and because that conversation falesly [sic] discredited Cohn's competence as an attorney, he has been and is greatly injured thereby in his profession, and reputation. Cohn's qualifications, which were falsely denigrated, included service in the Justice Department in the Truman Administration, as an Assistant United States Attorney for the Southern District of New York, the Confidential Assistant to the United States Attorney in the Southern District of New York, and Special Assistant for Internal Security to Hon. James P. McGranery, Attorney General of the United States. In such capacities, Cohn had successfully prosecuted dozens of dope peddlers and counterfeiters, and won commendations from the United States Commissioner of Narcotics and the Director of United States Secret Service. He had been a successful prosecutor of the Julius and Ethel Rosenberg atom-spy ring, and of the second-string leaders of the Communist Party. Any and all of these qualifications were omitted and concealed to lend credibility to the Kennedy-Kerr conversation. Said Kennedy-Kerr airport conversation never in fact occurred and was fictional.

(b) a statement that the morning after Schine was assigned to Fort Dix, plaintiff Cohn appeared at the gate, to wit:

Character: Well anyway, in November Mr. Schine was inducted and sent to Fort Dix. Mr. Cohn was there the next morning at the gates.

No such thing occurred, as defendants knew and in exercise of ordinary diligence should have known;

(c) plaintiff Cohn's role in the Army-McCarthy hearings is falsely and deceptively depicted, with omissions of sequences necessary to present an accurate and contextual portrayal, to wit: the depiction of the Fred Fisher incident and plaintiff Cohn's participation therein omitted the fact that at the time of the incident, Cohn had been under intensive questioning by Welch for three days, in the course of which Welch acknowledged on television that national reaction was in protest against the manner of his questioning, apologized to Cohn, and acknowledged on television that Cohn was held "in gratifying high esteem by the American public." Said sequence omitted this background, although necessary to understand the McCarthy-Welch-Cohn participation in the Fisher incident. Defendants further omitted a vital televised sequence of delivery of a note of protest from Cohn to McCarthy, and McCarthy's reference to the note during the Fisher sequence. Defendants also omitted Cohn's publicly available explanation of this incident, and wilfully failed to consult with Cohn on the contextual accuracy of these sequences, despite Cohn's written offer of availability affirmed in November, 1976 and reaffirmed in December, 1976 and January, 1977.

(d) a fictional character, specifically referring to Cohn, Schine and McCarthy states at one point that their participation in the investigation of the U.S. Information Agency's Overseas Libraries was a campaign to burn the books of Sherwood Anderson, Steven Vincent Benet, Mark Twain, Louis Bromfield, Quentin Reynolds and Edna Ferber. Specifically, the following dialogue took place:

> Girl: But we were talking about Cohn and Schine.
>
> Man: Right. We were. Yeah. Excuse me. Now come along with me and we'll see what we

> have here. (Holding books) I've got Sherwood Anderson, Stephen Vincent Benet, Mark Twain. You should have Louis Bromfield in there, Quentin Reynolds, Edna Ferber. . . . Alright. Here. I once saw a copy of this—a first edition of Showboat being burned at the American Embassy in Sydney, Australia where I worked. Till I was fired for saying that I thought it was stupid. Those were torched too (refers to other books). Real books being burned by real people. Not the gestapo but American Civil Servants. You see, our Junior Senator from Wisconsin said that our overseas libraries contained some 30,000 subversive volumes, paid for, of course, by the American taxpayer. Left wing pinko books like John Brown's Body, and the Maltese Falcon and Showboat here. So we took care of it. Good old American know how. . . . The day I was fired his Chief Counsel, Roy Cohn and the Chief Counsel's Chief Consultant, G. David Schine, they hit the road and went to Europe and they discovered (laughter) you're not going to believe this, they discovered some of the authors carried in our overseas libraries—this is really awful—well they were also available in some Soviet Information Centers. I mean like Mark Twain. Mark Twain. The Soviets had Mark Twain. They also had copies of Huckleberry Finn and copies of Tom Sawyer. Well let them have them. They must be a red. What's you real name, Mark Twain? Huh? Let's not have any of that Clemens garbage.

None of these people or their books were mentioned in any way during the hearings or in the reports on this investigation. However, objectionable books were found in the Overseas Libraries. As one report indicated.

> "State Department Information Service libraries abroad function with American taxpayers' money as part of the program to expose and combat communism. The purchase and use of works by authors who are either known Communists or who were long and consistent supporters of the Communist cause by these special-purpose libraries to combat Communist propoganda is obviously inconsistent with the purposes of these libraries."

The truth is that at least 12 authors who had been either identified under oath as having been involved or implicated in Soviet espionage or had acted in some important or confidential capacity in behalf of Soviet Russia had written books found in the libraries. Many others who had written books found in these supposedly anti-Communist libraries were Communist Party members. These facts were never brought out in the movie and therefore this segment of the film was so slanted and distorted as to be defamatory and injurious particularly to the plaintiffs, Cohn and Schine, who were active in the investigation.

(e) throughout the entire film McCarthy and those closely associated with his cause, including Cohn, are depicted as ruthless, irresponsible men bent on the destruction of individual freedoms; and this was false and damaging to Cohn.

22. Specifically, as to the plaintiff Schine, the portrayal was false, defamatory and damaging in that:

(a) an alleged conversation between Robert F. Kennedy and Jean Kerr is depicted at an airport during which remarks disparaging Schine's competence to work on the staff of the committee were made, to wit:

> Robert Kennedy: I still don't understand why we are carrying young Lochinvar?

Jean Kerr: You mean, Mr. Schine? Roy hired him. . . .

No such conversation took place in words or substance; and because that conversation falsely discredited the competence of Schine's work, he has been and is greatly injured thereby in his profession as a businessman and his reputation.

(b) the facts, allegations, and quotation set forth in paragraph 21(d) are equally applicable to and damaging to Schine.

(c) throughout the entire film McCarthy and those closely associated with his cause, including Schine, are depicted as ruthless, irresponsible men bent on the destruction of individual freedoms; and this was false and damaging to Schine.

23. Since the plaintiffs, Roy M. Cohn and G. David Schine, are inextricably bound to Senator McCarthy and his cause both historically and in the film, and since Roy M. Cohn was specifically named a party to the Army-McCarthy hearings, they have been defamed and damaged by the overall bias and distortion of the film as well as its false, deceptive and maliciously libelous depiction of Senator McCarthy and events therein. Specifically, the following segments of the film were, in that manner, defamatory and damaging to the plaintiffs:

(a) a portion of the film attached Senator McCarthy's war record, and it suggests fakery of that record to the extent that all he did was shoot at coconuts for a lark and claim a military decoration that was illegitimate, to wit:

[reporter interviewing ficticious former service buddy of McCarthy who is now a car salesman:]

Salesman: It's every G.I.'s dream to screw up a system. Boy, he [McCarthy] could really do it

. . . [Laugh] . . . Hey, I didn't tell you about the citation did I?

Reporter: What citation?

Salesman: From Chester Nimitz himself. I guess you're too young to remember. Nimitz was the Commander of the Pacific Fleet, old Numero Uno. Now ths citation praised Joe for his meritorious and efficient service and his refusal to be hospitalized.

Reporter: McCarthy was hurt in the war?

Salesman: Oh yes man. He was hurt O.K. in a big naval encounter.

Reporter: But I thought he was a Marine?

Salesman: Yeah. Yeah. He was. But you see now, this happened on the ship taking us over there. During the equator-crossng ceremony, he slipped on the ship's ladder (laughter) and wrenched his ankle.

Reporter: He got a citation for horseplay above and beyond?

Salesman: [Laughing] Yeah. Yeah. And he would tell everybody that he had received his wound, his wound [laughter] during a plane crash on a runway at Guatal Canal. Then later he was telling everybody he had ten pounds of shrapnel in his leg. Ten pounds. I'm telling you (laughter) he was some kind of dude.

Reporter: What was his job?

Salesman: He was an intelligence officer. You know, he interviewed the pilots when they came back from bombing runs.

Reporter: A desk job?

Salesman: mmm, yeah, mostly.

Reporter: I understand he campaigned later as a tail gunner.

Salesman: Oh yeah, (laughter). Right. Right. Right. I forgot. (laughter) Yeah. First he said, I remember, he said he had been on fourteen dive-bombing missions. Well, now, he had been on four or five. You know, just safe ones. He went along for the ride, kind of. But then he said he had been on seventeen missions; and before you know it, it was up to thirty. (laughter) He went on thirty dive bombing missions. He asked them for medals in 1950 or something. And they gave them to him. I couldn't believe it. (laughter) Distinguished Flying Cross, Air Medal with four stars (laughter) tail gunner Joe.

[Fades to an alleged scene in McCarthy's army career. The scene opens with 60 seconds of no dialogue and just the character playing McCarthy sitting in a plane parked on a runway. For that entire period McCarthy is ridiculously depicted as shooting coconuts from a tree. Later at a club with two other servicemen the following dialogue takes place:]

McCarthy: Are you ready? Are you ready? [McCarthy hands the papers].

1st Serviceman: Yeah. I think I'm ready. I think I can handle it. What is it, a photo of your tractor?

2nd Serviceman: Oh dateline at advanced marine base . . . . .

McCarthy: I wrote it, I don't have to listen to it. That's worth ten thousand votes to me, Ted.

2nd Serviceman: What record? Breaking day of bombing. What is this garbage?

McCarthy: That day we bombed the abandoned Jap runways on the way to . . . . . I went along as tail gunner.

1st Serviceman: They got coconuts on . . . . .?

2nd Serviceman: They did. (laughter).

1st Serviceman: Oh. Oh yeah. I love it. I love it. That's beautiful. Like today. You ought to write up today too. You must have gone through a whole crate of amo. (laughter).

McCarthy: That's right. You know, you could write that up. You know there's this guy—shoots off, you know, whatever, two, three, four thousand rounds of ammunition (laughter) new military record and then you give the guys . . . . .

1st Serviceman: Oh, you?

McCarthy: Yeah.

2nd Serviceman: Yeah, but you've got to take his photograph . . . . . with him getting into the plane with his parachute on, his little hat . . . . . Tail Gunner Joe, (laughter) going off to do desperate battle with some coconuts.

McCarthy: Japanese coconuts. (laughter).

[They then agree to take McCarthy's photo and "send a clown to Congress". They then proceed to take McCarthy's picture in a scene which makes him look ridiculous. The scene then returns to the reporter and the salesman:]

Salesman: So, Ted wrote the story. How tail gunner Joe had set this new military record by firing off 4,700 rounds of ammunition in just one day and they sent it out—you know—with the pictures. Associated Press picked it up. They put it on the wire and it appeared in 1300 newspapers or something. (laughter) I mean he (McCarthy) was something else, you know what I mean, he had a, well you know . . . .

No other meaning can be attached to that segment of the film; and it was understood by the viewers of the movie

that such was the meaning. In point of fact, such representations were utterly false. Senator McCarthy's war record was brave and good. The truth of the matter is that at the age of 33, McCarthy waived his judicial exemption from military service and joined the Marines. He entered as a private and was discharged as a captain. He served in the Pacific and was awarded the Distinguished Flying Cross and the Air Medal with four oak-leaf clusters. Among the many accolades praising McCarthy's military record, the words of the Commander-in-Chief of the United States Pacific Fleet, Admiral Chester W. Nimitz, expose the outrageous lie depicted in the movie:

> "For meritorious and efficient performance of duty as an observer and rear gunner of a dive bomber attached to a Marine scout bombing squadron operating in the Solomon Islands area from September 1 to December 31, 1943. He participated in a large number of combat missions, and in addition to his regular duties, acted as aerial photographer. He obtained excellent photographs of enemy gun position, despite intense anti-aircraft fire, thereby gaining valuable information which contributed materially to the success of subsequent strikes in the area. Although suffering from a severe leg injury, he refused to be hospitalized and continued to carry out his duties as Intelligence Officer in a highly efficient manner. His courageous devotion to duty was in keeping with the highest traditions of the naval service."

(b) The facts, allegations and quotations set forth in paragraph 21(d) are equally applicable to and damaging to McCarthy and therefore the plaintiffs.

(c) A particularly blatant falsehood was presented when the actress playing McCarthy's secretary, Jean

Kerr, and the actor portraying McCarthy, engaged in the following dialogue:

> Jean Kerr: Vice President Nixon called.
>
> McCarthy: Did you talk to him?
>
> Jean Kerr: Yes, you got it. You have been appointed Chairman of the Committee on Government Operations and you are permitted, if you want, to become Chairman of its own permanent Sub-Committee on Investigation.

In actuality, Senate Chairmanships are given based on seniority and not by the Vice President of the United States. Nixon had joined in the Eisenhower administration's attempts to destroy McCarthy. Hence this segment of the film simply smeared and defamed McCarthy's reputation by linking him with Nixon and identifying him with Nixon's later activities thereby injuring the plaintiffs. That this was the intent of the defendants becomes all the more obvious since the Nixon name is associated with McCarthy more than a half dozen times during the movie; and McCarthy is pictured with Nixon in a restaurant scene. There is no reason to associate the Nixon name with McCarthy but to defame McCarthy and those associated with him.

(d) One of the show's biggest lies that defamed and damaged all those closely associated with McCarthy was when one of the fictional charatcers said at the end of the program, referring to McCarthy, "But he himself caught no Communists, found no traitors, uncovered no subversives, not one." The clear implication was that McCarthy and his associates had simply made false unfounded allegations and it was so understood by the film's viewers. Nothing could be further from the truth. Many of those named as Communists by McCarthy were proven to be Communists. Hence that statement was damaging to McCarthy and those associated with him including Cohn and Schine.

(e) A deceptive section of the film showed an actor playing a British writer who complained that he had been deported from the United States because McCarthy had demanded it without cause, to wit:

> "McCarthy had me arrested. Probably a first even for him. They called up to talk about some silly thing. On my magazine, I suppose. Well, I was a British subject, still am . . . . . Well, he got onto your immigration people. Yes and told them he hoped my status would be studied expeditiously. And the next morning at the hotel at breakfast I was arrested and carried off to Ellis Island. I'll be darned if I wasn't . . . . sent bloody well home. I tell you my dear, your people were crackers here then."

Such an inference was a blatant lie which was defamatory and damaging. The character portrayed could have been none other than Cedric Belfrage. Belfrage was deported, but only after an immigration hearing heard evidence that Belfrage was a Communist sympathizer in England and a Communist Party member in the United States. He was actually identified as such by witnesses.

(f) The closing scenes present Senator McCarthy as an uncontrollable madman who has phased from alcoholism to insanity. That was pure fiction with no basis in fact; and it damaged the reputations of McCarthy and his associates.

(g) Throughout the entire film McCarthy is presented only as a man who led a ruthless, irresponsible cause bent on the destruction of individual freedoms, and this was a damaging lie.

24. Specifically as to the plaintiff, SB&B, the portrayal was defamatory and damaging since Roy M. Cohn is employed by, closely associated with and the principal

producer of income for SB&B and his reputation is enextricably [sic] bound to the professional reputation and character of SB&B. Hence, as a result of the false defamatory and damaging portrayal of Cohn, SB&B has been damaged in its business since the film affected the confidence certain members of the public and potential clients had in SB&B.

25. Upon information and belief, defendants NBC, Eckstein and UCS caused to be published the false and defamatory statements contained in "Tail Gunner Joe" with actual malice and with reckless disregard for their truth or falsity.

26. Upon information and belief, defendants made no sufficient attempt to verify the truth of the false and defamatory statements contained in "Tail Gunner Joe" prior to their publication.

27. Upon information and belief, in pursuance of the conspiracy described herein, the defendants extensively advertised the film's appearance in the City, County and State of New York, and throughout the nation as a "true story" and "fact based dynamite." Defendants also sought out and received local and national publicity for the film in newspapers and magazines. Both the ads and the publicity resulted in further supporting the slant of the movie and in increasing the injury suffered by the plaintiffs.

28. As a result of the aforesaid conspiracy and particularly the publication of "Tail Gunner Joe", and the false and defamatory statements contained therein, plaintiffs, Roy M. Cohn, G. David Schine and SB&B have been held up to ridicule and contempt and have been injured in their professions, reputations, good names and fame, all in the sum of $5,000,000 (Five Million Dollars).

29. Since, pursuant to the aforementioned conspiracy, "Tail Gunner Joe" was composed and published maliciously, wilfully, wantonly and in reckless disregard of their falsity of and concerning the plaintiffs, punitive damages should be awarded the plaintiffs in the sum of Fifteen Million Dollars ($15,000,000) to serve as a deterrent to the defendants from engaging in similar conduct in the future.

AS AND FOR A SECOND CAUSE OF ACTION

30. Plaintiffs repeat and reallege with the same force and effect Paragraphs 1 through 25 as if set forth at length hereat, and further allege as follows:

31. Said publication of the movie, ads and publicly were intentionally done not only without the consent of the plaintiffs, Cohn and Schine, but in direct contravention of their express desires. For trade and commercial purposes the defendants used plaintiffs' names and had actors depict them in the film, ads and publicity mentioned hereinabove. Said publication was unreasonable, intentional and malicious and therefore an invasion of plaintiffs' right to privacy, and a violation of Sections 50 and 51 of the New York Civil Rights Law.

32. That the plaintiffs' names and reputations are of great pecuniary value to them in their respective professions.

33. That by reason of the said knowing, wilful, malicious and unlawful publication, the plaintiffs Roy M. Cohn and G. David Schine, have been greatly damaged in their professions and have suffered great anxiety of mind, humiliation and mortification, and have been exposed to public ridicule and contempt and otherwise greatly damaged, all in the sum of $5,000,000 (Five Million Dollars).

34. Since, pursuant to the aforementioned conspiracy, "Tail Gunner Joe" was composed and published maliciously, wilfully and in disregard of the plaintiffs right to privacy, punative [sic] damages should be awarded the plaintiffs Cohn and Schine in the sum of Fifteen Million Dollars ($15,000,000) to serve as a deterrent to the defendants from engaging in similar conduct in the future.

WHEREFORE, plaintiffs demand judgment as against defendants as follows:

(a) for general and special damages pursuant to the First Cause of Action in the sum of Five Million Dollars ($5,000,000) with interest;

(b) for punitive damages pursuant to the First Cause of Action in the sum of $15,000,000 (Fifteen Million Dollars) with interest;

(c) for general and special damages pursuant to the Second Cause of Action in the sum of $5,000,000 (Five Million Dollars) with interest;

(d) for punitive damages pursuant to the Second Cause of Action in the sum of $15,000,000 (Fifteen Million Dollars) with interest;

(e) such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
July 11, 1977

LANG & NESCI, P.C.
Attorneys for Plaintiffs
271 North Avenue
New Rochelle, New York
(914) 636-0300

Exhibit A

November 30, 1976

Herbert S. Schlosser, President
National Broadcasting Co., Inc.
30 Rockefeller Plaza
New York, New York

Dear Mr. Schlosser:

It has come to my attention that Universal Studios are filming, and your television network intends to air a biographical film, "Tail Gunner Joe", portraying various events concerning Senator McCarthy and the Army-McCarthy hearings of 1954. As you know, I was Chief Counsel to the U.S. Senate Permanent Subcommittee on Investigation during 1953 and 1954; and I was involved with the Army-McCarthy hearings of 1954.

I am particularly concerned that no one has contacted me to obtain permission to use an actors to depict me, if this should be the case. Therefore, I am writing to express my extreme disapproval of the use of any actors to represent me in this film without my consent.

Moreover, I am equally concerned that your film present these events fairly and accurately. Your lack of communication with me or, as far as I know, any of the other principal participants on our side, plus the nature of the advance publicity, give me grave concern that such fairness and accuracy is neither the intent nor result of the film.

I am available to view this work at any mutually convenient time, with a view towards contributing to the correction of any inaccuracies or slant, if the facts so mandate, and await your response to both points made in this letter.

Sincerely,

/s/ ROY COHN
ROY M. COHN

/nl
CC: Universal Studios—
for similar attention and action

Exhibit B

January 3, 1977

Roy M. Cohn, Esquire
Saxe, Bacon & Bolan, P.C.
39 East 68th Street
New York, New York 10021

Reference: "TAIL GUNNER JOE"

Dear Mr. Cohn:

Your letter of November 30, 1976 addressed to Mr. Herbert S. Schlosser, President of National Broadcasting Company, Inc., has been referred to Universal Television, as the producers of the proposed television program regarding the late Senator Joseph McCarthy. You are correct in your statement that we are developing for production, and for broadcast over the National Broadcasting Company, a biographical television film regarding Senator McCarthy, and further correct in your assumption that various events in the public life of Senator McCarthy, and particularly the matters commonly known as the "Army-McCarthy Hearings" will be portrayed.

Universal Television has produced this biographical film, based upon its extensive research and matters which are clearly within the public record. As you must be aware, it would be impossible to accurately depict the events of that period of time without reference to you and to your official involvement as Chief Counsel to the U.S. Senate Permanent Subcommittee and other involvement in the "Army-McCarthy Hearings". Since you were clearly a public figure as a result of such hearings, and the matters which then occurred were then and continue to be clearly matters of public interest, we believe that we have the legal right to portray you in connection with the biographical film. Naturally, we will insure that such portrayal is scrupulously accurate to the events which in fact occurred and which are a matter of public record.

Because many public figures who were involved with those proceedings will be depicted, it becomes logistically difficult to ask for assistance and suggestions from all of such persons, and we believe it would be an injustice to seek advice and opinions from only a selected group. Furthermore, the Constitutional rights of free speech and fair comment would be seriously interfered with if we were to be required to obtain consent from public figures to portray and depict events of public interest.

Respectfully yours,

/s/ SHELDON M. MITTLEMAN,
SHELDON M. MITTLEMAN, Attorney

Exhibit C

January 24, 1977

Sheldon M. Mittleman, Esq.
Universal City Studios, Inc.
100 Universal City Plaza
Universal City, California 91603

Re: "Tail Gunner Joe"

Dear Mr. Mittleman:

Your letter is not responsive to mine, and makes no sense.

The fact that I might be a public figure does not invite or permit commercial exploitation of me, and invasion of my privacy for these purposes without my consent, which I have not given and will not give under the present circumstances.

Your pious remarks about it being improper to speak to one side (assumedly ours) as interfering with the balance of your product are hardly consistent with the slew of advance publicly heralding this production as one highly critical of Senator McCarthy and those persons and events associated with him. Your failure to even offer to permit comments on the script and the proposed product and other correction of inaccuracies, and the taking of things out of context, confirms our information as to just what the intentions of your client and NBC are in this matter.

Sincerely yours,

/s/ ROY COHN
ROY M. COHN

Exhibit D

January 20, 1977

Jay E. Gerber, Esq.
Assistant General Counsel
National Broadcasting Co., Inc.
30 Rockefeller Plaza
New York, New York

Dear Mr. Gerber:

I was very disappointed with NBC's reply to my letter of November 30, 1976, concerning the film "Tail Gunner Joe". Although NBC intends to air this documentary film concerning an important historical figure, they seem very disinterested in the accuracy of same. Clearly, NBC has a duty and an obligation to insure that a film of this type portrays events and characters fairly and accurately.

Hence, I want to again express my extreme disapproval of the use of any actors to represent me in this film without my consent. Furthermore, I want to renew my offer to view this work with a view towards contributing to the correction of any inaccuracies, if the facts so mandate. I hope you will not once again attempt to shirk your responsibilities and merely refer me to Universal Studios. Rather, I hope you will meet your obligation and contact me so that we can arrange a mutually convenient time for such a viewing.

Sincerely,

ROY M. COHN

Exhibit E

February 2, 1977

Roy M. Cohn, Esq.
Saxe, Bacon & Bolan
39 East 68th Street
New York, New York 10021

Dear Mr. Cohn:

I regret that you were disappointed with our reply to your previous letter regarding the television movie "Tail Gunner Joe," which has been licensed by Universal Studios for showing on the NBC Television Network. Since production of the film is under the control of Universal, we do not consider it to be a "shirking of responsibility" when we asked you to deal directly with Universal. Furthermore, as you recognize, the movie does deal with public figures and public events, including, in part, your participation in the well-known and well-publicized Army-McCarthy hearings.

We continue to think that you should deal directly with Universal, the producer of the film, if you are still interested in expediting consideration of your requests.

Sincerely yours,

/s/ JAY E. GERBER
JAY E. GERBER

cc: A. Shane—Universal

Exhibit F

January 31, 1977
Roy M. Cohn, Esquire
Saxe, Bacon & Bolan, P.C.
39 East 68th Street
New York, New York 10021

RE: TAIL GUNNER JOE

Dear Mr. Cohn:

This will acknowledge receipt of your letter of January 24, 1977.

We are of the opinion that portrayal of matters of public record by a public figure involving a matter permanently of public interest does not constitute an invasion of privacy, under the First Amendment and Supreme Court decisions.

In view of the numerous theatrical and television pictures about Senator McCarthy in the past twenty years, it seems strange that you should take such a position. In any event, there is no doubt that constitutional protections of free speech do apply to motion pictures, the same as they do to books and other forms of comment.

I will not comment upon either the amount or the content of publicity about the photoplay, since such publicity has not been issued by Universal. Putting aside the question of whether our photoplay may be critical of the late Senator McCarthy, (since such matter cannot be of legal concern to you), we believe that the portrayal of your public acts is factually correct and based on public records and matters of public knowledge. Your assumption that the picture contains inaccuracies, and will contain matters out of context, is an assumption we believe to be totally incorrect.

It would appear that your letter was written "for the record". This letter, accordingly, is written "for the

record" to dispel such inferences. Our intent is to portray accurately an important period of American history. This we believe we have done.

Very truly yours,

/s/ SHELDON M. MITTLEMAN
SHELDON M. MITTLEMAN
Attorney

Exhibit G

December 14, 1976

Mr. H.H. Martin, President
Universal Pictures
100 Universal City Plaza
University City, California 91608

Dear Mr. Martin:

I have been informed that Universal is producing a biographical film entitled TAIL GUNNER JOE which is to be aired on NBC. I am told that this film will portray certain aspects of the activities of the U.S. Senate Subcommittee on Investigations during the period of 1952-1954 including the Army-McCarthy hearings of 1954. You perhaps will recall that I was Chief Consultant to the U.S. Senate Permanent Subcommittee on Investigations during part of this time and that I was involved with the Army-McCarthy hearings.

As of this date no one has contacted me to request my permission for an actor to portray me, if this is intended to be. May I make it clear herewith that I do not approve of any actor portraying me in this film without my prior written consent.

Furthermore, as of this date no one has communicated with me to check any of the details of that era with me. I am concerned that accuracy and fairness be observed and I am wondering if the producers of this film intend to observe this policy.

May I suggest that a script of the project be forwarded to me at the earliest possible time in order that I may have an opportunity, if needed, to comment on any inaccuracies. I will also be happy to screen the film in rough cut and make any further comment which may be necessary.

Sincerely,

DAVID SCHINE & COMPANY, INC.
G. David Schine

Exhibit H

December 14, 1976

Mr. Herbert S. Schlosser
President
National Broadcasting Company, Inc.
30 Rockefeller Plaza
New York, New York

Dear Mr. Schlosser:

I have been informed that Universal is producing a biographical film entitled TAIL GUNNER JOE which is to be aired on NBC. I am told that this film will portray certain aspects of the activities of the U.S. Senate Subcommittee on Investigations during the period of 1952-1954 including the Army-McCarthy hearings of 1954. You perhaps will recall that I was Chief Consultant to the U.S. Senate Permanent Subcommittee on Investigations during part of this time and that I was involved with the Army-McCarthy hearings.

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May I suggest that a script of the project be forwarded to me at the earliest possible time in order that I may have an opportunity, if needed, to comment on any inaccuracies. I will also be happy to screen the film in rough cut and make any further comment which may be necessary.

Sincerely,

DAVID SCHINE & COMPANY, INC.
G. David Schine

Exhibit I

December 27, 1976

G. David Schine
David Schine & Company, Inc.
626 South Hudson Avenue
Los Angeles, California 90005

Dear Mr. Schine:

Herbert S. Schlosser, President of NBC, has referred your letter dated December 14, 1976, to me for reply.

As you know, the television film, TAIL GUNNER JOE is being produced by Universal Studios and has merely been licensed to NBC for television broadcast. We suggest, therefore, that you direct your comments to Universal. To expedite matters, I have sent a copy of your letter and my response directly to Universal.

Sincerely yours,

/s/ JAY E. GERBER/jn
JAY E. GERBER

cc: Arnold Shane—Universal